STATE OF MICHIGAN
IN THE SUPREME COURT

THE PEOPLE OF THE STATE OF MICHIGAN
Plaintiff-Appellee,

v

Supreme Court
No. 151439

PHILLIP JOSEPH SWIFT,
Defendant-Appellant.

Court of Appeals No. 318680
Wayne Circuit Court No. 13-005130-01-FC
(Hon. Timothy M. Kenny)

PLAINTIFF-APPELLEE'S SUPPLEMENTAL BRIEF IN OPPOSITION TO DEFENDANT'S APPLICATION FOR LEAVE TO APPEAL

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COUNTERSTATEMENT OF JURISDICTION

Defendant-Appellant did not include a statement of jurisdiction in his supplemental brief. This Court has jurisdiction to consider his application for leave to appeal pursuant to MCR 7.303(B)(1).

COUNTERSTATEMENT OF ISSUES PRESENTED

I.

A habitual-offender notice must be served "within 21 days after the arraignment on the information" so that a defendant is promptly notified he faces an enhanced sentence. It is reasonable to construe the term "within" as allowing service any time after a defendant is charged, as long as service occurs before the end of the time period, that is, 21 days after the AOI. Does service of the notice before the AOI comply with the statute's language and intent?

The trial court was not asked this question.
The Court of Appeals was not asked this question.
The People answer: "YES"
Defendant answers: "NO"

II.

MCL 769.26 provides for harmless-error review of any error in "pleading or procedure," and MCR 2.613 permits harmless-error review for anything "done or omitted" by "the parties." An alleged defect in the service of a habitual-offender notice is an error by a party, the prosecution, in its pleading and procedure. Is a preserved claim that the notice was not properly served subject to harmless-error review?

The trial court found no error.
The Court of Appeals answered: "YES"
The People answer: "YES"
Defendant answers: "NO"

III.

An error in anything done or omitted by a party is harmless unless it results in a miscarriage of justice or, stated differently, unless refusal to grant relief would be inconsistent with substantial justice. Here, defendant was not prejudiced by any lack of proper service or proof thereof, since he had actual notice of the enhancement *before* the AOI, and counsel waived the reading of the information, suggesting he had a copy of it. Was any error harmless?

The trial court found no error.
The Court of Appeals answered: "YES"
The People answer: "YES"
Defendant answers: "NO"

INTRODUCTION

MCL 769.13 is satisfied as long as the prosecution provides notice of habitual-offender sentence ramifications "within 21 days after" the defendant's arraignment on the information. That is, the statute identifies only the *end* of the period within which a habitual-offender notice must be served. Service of the notice before the AOI complies with the statute's language and intent.

In this case, defendant was informed well before the deadline that the prosecution had charged him as a habitual-third offender; he also acknowledges that he is, in fact, a three-time felon. Nevertheless, he maintains that he could not be sentenced as a repeat offender because the notice came too early, because it may not have been provided in writing, and because the prosecution never filed a proof of service.

But none of these objections holds water. There is no such thing as legal notice that arrives too early, and the statute in question does not support, much less require, that interpretation. That is, the notice here *was* clearly filed "within 21 days after" the arraignment on the information, as that phrase is properly understood. Additionally, since the enhancement was included on the information—which defendant chose to waive the reading of—the record below supports the inference that he *did* have written notice. Third, although the People did not file a proof of service, the lack thereof does

not foreclose the application of the habitual-offense statute. In any event, since defendant had actual notice and admits he is a repeat offender, any error is harmless as a matter of law.

An alleged defect in the service of a habitual-offender notice is an error by a party—the prosecution—in its pleading and procedure and is thus subject to harmless-error review. Specifically, MCL 769.26 provides for harmless-error review of any error in "pleading or procedure," and MCR 2.613 permits harmless-error review for anything "done or omitted" by "the parties." The strict-compliance holding of *In re Forfeiture of Bail Bond (People v Gaston)*, 496 Mich 320, 330 (2014), does not undermine the above: *Gaston* is not on point and is distinguishable on numerous grounds, including that this Court was interpreting a different statute in a different chapter of the Code of Criminal Procedure which protected different rights of removed third parties, rather than a criminal defendant's. Indeed, this Court has already applied a harmless-error standard in reviewing a habitual-offender notice claim.

Here, defendant received actual notice that he faced enhanced sentencing as a habitual-third offender from his arraignment on the warrant. That notice was factually accurate from the inception of the case, never changed thereafter, was on all three

charging documents, and defendant has never claimed otherwise. Even if there was error in service of the notice or filing a proof of service, it was harmless.

COUNTERSTATEMENT OF FACTS

On May 24, 2013, the Wayne County Prosecutor's Office recommended charges against defendant for armed robbery,[1] first-degree home invasion,[2] unarmed robbery,[3] intentional discharge of a firearm at a dwelling or occupied structure,[4] and felony-firearm, second offense.[5] Each of the three charging documents (the felony warrant, complaint, and information) also contained a habitual-offender third-offense notice which notified defendant that he faced enhanced sentencing as a habitual offender.[6]

Defendant was arraigned on the warrant on May 25, 2013. The magistrate read the charges *and the enhanced sentencing penalties* defendant faced, and defendant

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[1]MCL 750.529.

[2]MCL 750.110a(2).

[3]MCL 750.530.

[4]MCL 750.234b.

[5]MCL 750.227b.

[6]The three documents are attached as Appendix A. An amended information (with no changes to the habitual notice) is attached as Appendix B.

acknowledged he heard them. 5/25, 3. The circuit court Register of Actions contains an entry called "Habitual Offender," reflecting the enhancement notice was in fact filed with the charging documents on May 24, 2013 in district court.[7]

At the preliminary examination on June 6, 2013, when discussing changes to the felony information counsel did not state she lacked a copy. 6/6, 29. After defendant was bound over, defense counsel waived the reading of the felony information at the arraignment on the information ("AOI") in circuit court on June 13, 2013,[8] and the information was filed with the court that day. 6/13, 3; 2/28/14, 6. Accordingly, copies of the notice of enhancement were filed with both the district and circuit court, not just "within 21 days after the" AOI, but by that date.

On September 6, 2013, a jury convicted defendant of unarmed robbery and first-degree home invasion.[9] He was sentenced on September 23, 2013 within the guidelines as a habitual-third offender to 12-30 years and 12-40 years imprisonment, respectively.[10] 9/23, 15. He filed a motion for resentencing on February 28, 2014,

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[7]The Register of Actions is attached as Appendix C.

[8]At the AOI, a different defense counsel stood in for the preliminary-exam defense counsel.

[9]On July 17, 2013, a new defense counsel was assigned.

[10]At sentencing a new defense counsel substituted in for the trial counsel and filed an appearance.

Defendant was sentenced on the guidelines' B Grid, cell E-IV. His minimum

arguing that he was not provided the proper notice of his sentence enhancement. The trial court denied the motion, finding that the People had complied with the notice requirement and defendant was, in fact, on notice of the habitual-third enhancement at the arraignment on the information: "The copy of the Information was in fact in the court file on that particular day." 2/28, 6. The court concluded: "I do think that there has been compliance. The defendant was on notice with regards to the habitual in this matter." 2/28, 7.

Defendant appealed to the Court of Appeals, arguing (1) that he was entitled to resentencing because he did not receive proper notice of the third-habitual-offender notice, and (2) that he was denied the right to present a defense because of an evidentiary ruling by the court. The Court of Appeals affirmed defendant's convictions and sentence, rejecting both arguments. Regarding the first issue, the Court found that (1) the prosecution fulfilled its obligation under MCL 769.13 to file a written notice by filing the notice both in district and circuit court, and (2) defendant had actual knowledge of the prosecutor's intent to seek an enhanced sentence, and the notice was also written on the three charging documents, to which defendant had

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sentence range without enhancement would have been 84-140 months. As a habitual-third offender, his minimum range was 84-210 months. His minimum sentence on each of the two convictions was 12 years (144 months). 9/23, 15. As a habitual-third offender he also faced, and received, double the maximum sentence on each of the two convictions. MCL 769.11(1)(a).

access, and (3) to the extent defendant argued that there was no proof of service as required by MCL 769.13, any such error was harmless because (a) defendant was nevertheless provided notice, (b) never objected at sentencing to being sentenced as a third habitual offender, and (c) did not contend he "had any viable challenge to the habitual offender enhancement."[11]

Defendant filed a pro per application for leave to appeal with this Court. This Court, in turn, issued an order directing the People to answer the application:

> In particular, we direct the prosecutor to respond to the question whether the defendant or his attorney was personally served with a copy of the information containing the habitual offender notice at the arraignment. If not, the prosecutor is directed to explain when and how the habitual offender notice was served on the defendant or his attorney. [MSC Order dated April 6, 2016.]

The People responded that written notice of the enhancement was included on all the charging documents, and filed in both district and circuit court by the AOI date. While the People did not file a proof of service, the People contended this error was harmless because defendant was provided—from the inception of the case—with actual notice of the enhancement.

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[11] *People v Swift*, unpublished opinion per curiam of the Court of Appeals, issued February 19, 2015 (Docket No. 318680), pp 2-3, attached as Appendix D.

This Court scheduled oral argument on whether to grant the application or take other action, ordering the parties to file supplemental briefs addressing:

> (1) whether serving the habitual offender notice prior to the defendant's arraignment on the information satisfies the 21-day time requirement under MCL 769.13, and (2) if not, whether the harmless error rules apply to the failure to serve the habitual offender notice within the 21-day time requirement under MCL 769.13. With regard to the latter issue, see *In re Forfeiture of Bail Bond*, 496 Mich 320, 330 (2014); see also MCL 769.26 and MCR 2.613. [MSC Order dated October 12, 2016.] The People answer (1) Yes and (2) Yes as elaborated in issues I and II of this brief, and also contend in issue III that any error was harmless.

ARGUMENT

I.

A habitual-offender notice must be served "within 21 days after the arraignment on the information" so that a defendant is promptly notified he faces an enhanced sentence. It is reasonable to construe the term "within" as allowing service any time after a defendant is charged, as long as service occurs before the end of the time period, that is, 21 days after the AOI. Service of the notice before the AOI complies with the statute's language and intent.

Standard of Review

An issue involving the interpretation of a statute is a question of law which this Court reviews novo.[12]

Discussion

Since MCL 769.13 identifies only the end of the period "within" which a habitual-offender notice must be served, it is reasonable to construe the language as allowing service any time after a defendant is charged, as long as service occurs before the end of the time period, i.e., 21 days after the AOI. Service of the notice before the AOI complies with the statute's language and intent.

[12] *People v Gardner*, 482 Mich 41, 46 (2008).

This Court's goal in construing a statute is "to ascertain and give effect to the intent of the Legislature."[13] The "touchstone of legislative intent is the statute's language."[14] This Court interprets the statute's words "in light of their ordinary meaning and their context within the statute and read[s] them harmoniously to give effect to the statute as a whole."[15] Every word should be given meaning.[16] If the statute's language "is clear and unambiguous," this Court assumes "that the Legislature intended its plain meaning" and it enforces the statute as written.[17] When statutory language is unambiguous, judicial construction is not required or permitted because this Court presumes the legislature intended "the meaning that it plainly expressed."[18] Nonetheless, statutory language should be construed reasonably, keeping in mind the statute's purpose, "to avoid absurd results."[19]

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[13]*People v Gardner*, 482 Mich 41, 50 (2008) (citation and internal quotation omitted), interpreting the statute at issue here, MCL 769.13.

[14]*Gardner*, 482 Mich at 50.

[15]*People v Peltola*, 489 Mich 174, 181 (2011).

[16]*Peltola*, 489 Mich at 181.

[17]*Gardner*, 482 Mich at 50 (citation and internal quotation omitted).

[18]*Peltola*, 489 Mich at 181; *Gardner*, 482 Mich at 50.

[19]*People v Hutcheson*, 308 Mich App 10, 13 (2014) (internal quotation and citation omitted), interpreting the sentencing guidelines.

MCL 769.13, governing habitual-offender sentence enhancement notices, requires written notice of an enhanced sentence to be filed "within 21 days after" the defendant's arraignment on the information or, if the arraignment is waived, within 21 days after the filing of the information:

> (1) In a criminal action, the prosecuting attorney may seek to enhance the sentence of the defendant as provided under section 10, 11, or 121 of this chapter, by filing a written notice of his or her intent to do so within 21 days after the defendant's arraignment on the information charging the underlying offense or, if arraignment is waived, within 21 days after the filing of the information charging the underlying offense.
>
> (2) A notice of intent to seek an enhanced sentence filed under subsection (1) shall list the prior conviction or convictions that will or may be relied upon for purposes of sentence enhancement. The notice shall be filed with the court and served upon the defendant or his or her attorney within the time provided in subsection (1). The notice may be personally served upon the defendant or his or her attorney at the arraignment on the information charging the underlying offense, or may be served in the manner provided by law or court rule for service of written pleadings. The prosecuting attorney shall file a written proof of service with the clerk of the court.[20]

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[20]MCR 769.13(1) and (2). MCR 6.112(F) is the court-rule counterpart to MCL 769.13 and uses the same language at issue here. It states in pertinent part: "The notice must be filed within 21 days after the defendant's arraignment on the information charging the underlying offense or, if arraignment is waived or eliminated as allowed under MCR 6.113(E), within 21 days after the filing of the information charging the underlying offense."

The purpose of requiring the prosecutor to promptly file the enhancement notice "is to provide the accused with notice, at an early stage in the proceedings, of the potential consequences should the accused be convicted of the underlying offense."[21]

A. It is reasonable to conclude the Legislature intended to allow service of the notice from the start of the case until 21 days after the AOI.

This Court has asked whether serving the habitual-offender notice before the AOI complies with MCL 769.13. The habitual-offender statute's 21-day time limit is the *end* of the time period "within" which the notice must be served. This countdown is triggered by the AOI date or, if the AOI is waived, by the filing of the information.[22] An information can be filed as soon as the preliminary examination is held (or waived) and defendant is bound over.[23] Since a defendant can waive the AOI

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[21]*People v Shelton*, 412 Mich 569 (1982) (assessing whether the prosecutor proceeded "promptly," and creating the 14-day notice rule since there was no time period stated in MCL 769.13 until 1994); *People v Morales*, 240 Mich App 571, 582 (2000).

[22]MCL 769.13(1). For ease of reference going forward, a reference to "AOI" in the context of the habitual-offender notice also includes the alternate scenario where a defendant waives the AOI and the information filing date triggers the 21-day end of the filing period.

[23]MCL 767.42(1) states, in pertinent part: "An information shall not be filed against any person for a felony until such person has had a preliminary examination therefor, as provided by law, before an examining magistrate, unless that person waives his statutory right to an examination." And MCR 6.112(C) provides: "The prosecutor must file the information or indictment on *or before* the date set for the arraignment [emphasis added]."

at the preliminary examination,[24] giving a defendant the required enhancement notice by the preliminary exam date certainly is not prohibited by the habitual-offender statute. And since a defendant can also seek permission to waive a preliminary exam,[25] it is conceivable a defendant could waive both the preliminary exam and the AOI.[26]

In describing a time period, the term "within" usually denotes a discrete beginning and ending. The term is not defined in the habitual-offender statute. Applying "common sense,"[27] the People suggest the Legislature intended that this time period could *begin* at the inception of the case, as long as the enhancement notice was served by the *end* of the time period, that is, "21 days after" the AOI. The statute puts no limitation on how *early* the notice can be served. There is no reason to read the provision as preventing notice from being given before the AOI.

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[24]MCR 6.110(A). Also, MCR 6.113(C) states a defendant may waive the AOI in writing "at or before the time set for the arraignment [on the information] . . . ."

[25]MCR 6.110(A).

[26]Effective January 1, 2015, MCR 6.108 established a probable-cause conference ("PCC") held after the arraignment on the warrant ("AOW"). The PCC rule permits a defendant to waive either the PCC, the preliminary exam, or both. MCR 6.108(A).

[27]*In re Forfeiture of Bail Bond (People v Stanford)*, __ Mich App __ ; __ NW2d __ (2016) (Docket No. 328784); slip op at 3: "In interpreting a statute, we apply the rule of ordinary usage and common sense."

In sum, to read the statute as penalizing the prosecution for complying with the notice requirement immediately—especially if nothing in the notice changes thereafter—would elevate form over substance and ignore common sense.[28]

B. There is no sound reason to read the statute as precluding service of the enhancement notice before the AOI.

It defies logic for a defendant to complain, under any circumstances, that he or she received a valuable piece of legal information too soon. Keeping in mind the purpose of the habitual-offender notice requirement—to put defendant on notice as soon as possible that he faces enhanced sentencing—such a claim loses even more ground, and makes it highly unlikely the Legislature intended such a limiting interpretation of the service period.

Defendant responds that "[f]iling the Information and/or habitual offender notice in the District Court is of no consequence as the District Court does not have jurisdiction over trials and sentences of felonies. . . .This being the case, the filing of the Habitual Offender notice prior to the Circuit Court arraignment on the information

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[28]To the extent this Court is concerned that a habitual-offender notice served before the AOI would be premature because it could later change, this concern is addressed by the very language at issue, that is, the so-called "bright-line" 21-day requirement that prevents any changes to the notice after that date which increase the penalties a defendant faces (as discussed *infra*). *People v Ellis*, 224 Mich App 752, 755 (1997); *People v Morales*, 240 Mich App 571, 575 (2000). This is when the 21-day limit comes into play more meaningfully, by protecting a defendant from late service of an amended notice which increases his potential punishment.

is meaningless."[29] Following defendant's logic, nothing pertaining to felony charges should be filed in district court, and, if they are, they are meaningless. This, of course, is not true, since it is in district court that the charges are initially filed and a determination made whether probable cause to support them exists.[30] Appellant cannot explain why a defendant can only receive notice of a sentence enhancement in circuit court, as if the exact same notice, if provided in district court, somehow does not convey the same information.

Defendant futilely attempts to turn early notice of valuable information into a "negative" instead of the "positive" it clearly is. Early notice of enhanced sentencing could help a defendant decide whether to plea, and possibly whether to waive either the probable cause conference, the preliminary exam, the AOI, or all three.[31] Further, it gives him additional time to challenge any prior convictions in the enhancement

[29]Defendant's supplemental brief in support of his ALA, p 12.

[30]The People are not contending that the Felony Information takes effect before a defendant is bound over. But here it is an enhancement notice at issue, which is not only on the felony information but on all the charging documents.

[31]MCR 6.108(A); MCR 6.110(A); MCR 6.113(C).

notice he may be contesting, as provided for in MCL 769.13(4) and (6).[32] There is no downside to early notice of sentence enhancement, despite defendant's attempt to create one.

[32]MCL 769.13(4) provides in pertinent part: "A defendant who has been given notice that the prosecuting attorney will seek to enhance his or her sentence . . . may challenge the accuracy or constitutional validity of 1 or more of the prior convictions listed in the notice by filing a written motion with the court . . . ." MCL 769.13(6) provides in pertinent part: "The defendant, or his or her attorney, shall be given an opportunity to deny, explain, or refute any evidence or information pertaining to the defendant's prior conviction or convictions before sentence is imposed, and shall be permitted to present relevant evidence for that purpose."

II.

MCL 769.26 provides for harmless-error review of any error in "pleading or procedure," and MCR 2.613 permits harmless-error review for anything "done or omitted" by "the parties." An alleged defect in the service of a habitual-offender notice is an error by a party, the prosecution, in its pleading and procedure. Thus, a preserved claim that the notice was not properly served is subject to harmless-error review.

Standard of Review

Issues involving the interpretation of statutes and court rules are questions of law which this Court reviews novo.[33]

Discussion

MCL 769.26 provides for harmless-error review of any error in "pleading or procedure," and MCR 2.613 permits harmless-error review for anything "done or omitted" by "the parties"; an alleged defect in the service of a habitual-offender notice is an error by a party, the prosecution, in its pleading and procedure and is thus subject to harmless-error review.

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[33] *People v Gardner*, 482 Mich 41, 46 (2008); *People v Williams*, 483 Mich 226, 231 (2008). The same legal principles which govern the interpretation of statutes also apply when interpreting court rules. *Williams*, 483 Mich at 232.

For issue II, this Court asked the parties to answer "whether the harmless error rules apply to the failure to serve the habitual offender notice within the 21-day time requirement under MCL 769.13."[34]

A. The language in the harmless-error rules, and the caselaw interpreting them, support a finding that the rules apply to violations of the habitual-offender statute.

The harmless-error rule is codified in MCL 769.26 and MCR 2.613, which "present different articulations" of the same concept.[35] MCL 769.26 states:

> Sec. 26. No judgment or verdict shall be set aside or reversed or a new trial be granted by any court of this state in any criminal case, on the ground of misdirection of the jury, or the improper admission or rejection of evidence, or for error as to any matter of pleading or procedure, unless in the opinion of the court, after an examination of the entire cause, it shall affirmatively appear that the error complained of has resulted in a miscarriage of justice.

Similarly, MCR 2.613(A) states:

> **Harmless Error.** An error in the admission or exclusion of evidence, an error in a ruling or order, or an error or defect in anything done or omitted by the court or by the parties is not ground for granting a new trial, for setting aside a verdict or for vacating, modifying, or otherwise disturbing a judgment or order, unless refusal to take this

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[34]MSC Order dated October 12, 2016. This Court posed issue II in the event it was determined in issue I that service of an enhancement notice before the AOI is erroneous. In responding to issue II, the People do not concede this.

[35]*Williams*, 483 Mich at 232 (citation and internal quotation omitted).

> action appears to the court inconsistent with substantial justice.

A defect in the filing or service of a habitual-offender notice is an "error as to any matter of pleading or procedure" to which MCL 769.26 must be applied before a judgment (which a sentence is part of) is set aside. There is nothing in MCL 769.26 (or elsewhere) which excludes its application to the filing and service of habitual offender notices. Therefore, the "miscarriage of justice" standard applies when reviewing alleged violations of MCL 769.13. Similarly, the harmless-error rule in MCR 2.613(A) applies to "an error or defect in anything done or omitted" by "the parties."[36]

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[36]Defendant points to MCR 6.112(G), which (until 1-1-2017) excluded an untimely filing of an enhancement notice from that provision's harmless-error review:

> (G) Harmless Error. Absent a timely objection and a showing of prejudice, a court may not dismiss an information or reverse a conviction because of an untimely filing or because of an incorrectly cited statute or a variance between the information and proof regarding time, place, the manner in which the offense was committed, or other factual detail relating to the alleged offense. *This provision does not apply to the untimely filing of a notice of intent to seek an enhanced sentence.*

Michigan Court Order 16-0020 revised MCR 6.112 effective January 1, 2017, and one of the changes was deletion of the italized sentence above. The People contend that MCR 6.112(G) and its amendment have no bearing—good or bad—on this case. The last sentence was possibly deleted because it made no sense being there. If there is an error in the filing of a habitual-offender notice, the remedy is withdrawal of the notice

The Court of Appeals has held the habitual-offender statute's 21-day rule is a "bright-line test" for determining whether the prosecutor promptly filed a habitual-offender notice.[37] In those cases, though, the sentencing penalties defendant faced were increased after the 21-day period.[38] For example, in *People v Morales*,[39] the prosecution sought to increase defendant's enhancement from a second to a third habitual offender two months after the first notice was filed.[40] In contrast, a prosecutor *may* amend the enhancement notice to correct errors after the expiration of the 21-day period as long as the amendment does not increase the habitual-offender level, or otherwise "increase the sentencing consequences."[41] It follows that applying a harmless-error review is not inconsistent with the bright-line test. For example, if

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and, if withdrawn after sentencing, resentencing. In no case does the trial court "dismiss an information or reverse a conviction because of an untimely filing" of a habitual-offender notice. The removal of the last sentence could reflect this Court's agreement that it was out of place.

[37]*People v Ellis*, 224 Mich App 752, 755 (1997); *People v Morales*, 240 Mich App 571, 575 (2000).

[38]*Ellis*, 224 Mich App at 755; *Morales*, 240 Mich App at 573.

[39]*People v Morales*, 240 Mich App 571 (2000).

[40]*Morales*, 240 Mich App 571

[41]*People v Hornsby*, 251 Mich App 462, 472-473 (2002) (finding no prejudice when the convictions in the notice were corrected without increasing defendant's offender level).

a notice is untimely filed, and defendant had no actual notice of the sentence enhancement, the "bright-line" rule would govern, and prevent enhancement because the error was not harmless. Likewise, the bright-line rule would apply to prevent an amendment to a timely filed notice which seeks to increase a defendant's offender level after the 21-day period.

Finally, in *People v Walker*,[42] the Court of Appeals applied a harmless-error standard in reviewing a failure to file a proof of service of the habitual-offender notice.[43] *Walker* supports the People's position that the harmless-error rule applies as well to alleged errors in serving the habitual-offender notice.

B. This Court has already applied a harmless-error standard in reviewing a habitual-offender notice claim.

This Court has considered this issue before. In *People v Johnson*,[44] the prosecution filed a timely notice of habitual-fourth-offender enhancement and, then,

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[42]*People v Walker*, 234 Mich App 299 (1999).

[43]*Walker*, 234 Mich App at 314-315: "[A]ny error was harmless beyond a reasonable doubt. . . Defendant makes no claim that he did not receive the notice of intent to enhance . . . defense counsel admitted at the sentencing hearing that the notice of intent had been received . . ." The Court of Appeals found the failure to file the proof of service "in no way prejudiced defendant's ability to respond to the habitual offender charge." *Id*., 234 Mich App at 315.

See also, MCR 2.104(B): "Failure to file proof of service does not affect the validity of the service."

[44]*People v Johnson*, 495 Mich 919 (2013).

months after the 21-day window had passed, the trial court allowed an amendment to correct "the dates and convictions listed" in the notice. Defendant was sentenced accordingly, and the Court of Appeals affirmed. This Court granted leave; then, in a one-page order, it affirmed the Court of Appeals, finding defendant "was given timely notice of his enhancement level and had sufficient prior convictions to support a fourth habitual enhancement."[45] Citing MCL 769.26, this Court ruled there was "no miscarriage of justice when the trial court allowed the prosecution to amend the notice to correct the convictions . . . "[46] Similarly, citing MCR 2.613(A), this Court also ruled that affirming defendant's enhanced sentence was "not inconsistent with substantial justice."[47] Thus, in a one-paragraph order, this Court cited both harmless-error rules in denying relief. It would seem to follow both legally and logically that the two rules would apply to this case as well, since this case also involves an alleged violation of the habitual-offender statute.[48]

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[45] *Johnson*, 495 Mich at 919.

[46] *Johnson*, 495 Mich at 919.

[47] *Johnson*, 495 Mich at 919.

[48] In *People v Muhammad*, 497 Mich 988 (2015), this Court granted oral argument on whether to grant defendant's application for leave to appeal (a "MOAA"). Defendant there raised a similar argument as in this case: although he acknowledged that the felony complaint he received in district court contained a habitual-offender notice, he contended the People did not comply with MCL 769.13 because he was not timely served with the felony information which also contained

C. *In re Forfeiture of Bail Bond (People v Gaston)* is distinguishable on numerous grounds, and thus its strict-compliance holding should not apply to the habitual-offender statute.

This Court also asked the parties to consider *In re Forfeiture of Bail Bond (People v Gaston)*[49] in addressing issue II; in that case this Court strictly interpreted the notice provision of a different statute. *Gaston* involved the bail-bond statute, MCL 765.28, which requires the trial court to provide notice to a surety within seven days of a defendant's failure to appear, so the surety may appear in court to contest the forfeiture of whatever sum it posted on behalf of defendant.[50] Defendant failed to

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the (unchanged) enhancement notice. This Court asked the parties to brief whether "defendant's acknowledgment that he received a felony complaint" in district court which contained the notice satisfied MCL 769.13, and, if not, "the proper application of the harmless error tests" in MCR 2.613 and MCL 769.26 to violations of the notice requirements in MCL 769.13. At the MOAA the People (according to this Court's subsequent order) conceded they did not timely serve defendant with the habitual-offender notice. *People v Muhammad*, 498 Mich 909 (2015). This Court, *without ruling on the harmless-error issue*, vacated the Court of Appeals' holding that any error was harmless, ruling that the Court of Appeals first needed to determine whether the trial court's dismissal of the habitual-offender notice was erroneous before applying a harmless-error analysis. *Muhammad*, 498 Mich at 909. (On remand, the Court of Appeals found the trial court's dismissal was not erroneous.) Thus, in *Muhammad*, this Court never answered the question it originally posed, that is, whether the harmless-error rules in fact apply to alleged violations of MCL 769.13.

To clarify, to the extent the People in *Muhammad* conceded (and it is not clear they did) that defendant's receipt of the habitual notice in district court did not comply with MCL 769.13, the People here do not agree with that position.

[49] *In re Forfeiture of Bail Bond (People v Gaston)*, 496 Mich 320, 330 (2014).

[50] The notice is required seven days after a default is entered. MCL 765.28(1) states in pertinent part:

appear for trial, and the trial court ordered him rearrested and that his bond be forfeited. Three years later, the trial court sent notice to the surety to appear to show cause why it should not forfeit the amount it posted on behalf of defendant. The surety filed a motion to set aside the forfeiture due to the lack of timely notice; the trial court denied the motion and entered judgment against the surety for the amount of the bond it posted. The Court of Appeals rejected the surety's claim that the trial court's failure to provide timely notice barred forfeiture of the surety's bond.

This Court reversed, holding that when a statute requires a public officer to undertake certain action within a specified time period to safeguard another's rights, it is mandatory that the action be taken within that time period, "and noncompliant public officers are prohibited from proceeding as if they had complied with the

---

> . . .After the default [of a defendant] is entered, the court shall give each surety immediate notice not to exceed 7 days after the date of the failure to appear. . . . Each surety shall be given an opportunity to appear before the court on a day certain and show cause why judgment should not be entered against the surety for the full amount of the bail or surety bond. If good cause is not shown for the defendant's failure to appear, the court shall enter judgment against the surety on the recognizance for an amount determined appropriate by the court but not more than the full amount of the bail, or if a surety bond has been posted the full amount of the surety bond.

statute."[51] It found the notice provision of the bail-bond statute was such a provision, because it protected the surety's right to immediately begin searching for an absconding defendant to have him returned to custody so it does not forfeit the amount it posted on his behalf:

> Requiring the court to provide notice to the surety within seven days of the defendant's failure to appear clearly protects the rights of the surety by enabling the surety to promptly initiate a search for the defendant, which is obviously significant to the surety because "[a] surety is generally discharged from responsibility on the bond when the [defendant] has been returned to custody or delivered to the proper authorities...." . . . A surety's ability to apprehend an absconding defendant is directly affected by whether the surety has received prompt notice of the defendant's failure to appear because the former's ability to recover and produce an absconding defendant declines with the passage of time. [*Gaston*, 496 Mich at 330-331.]

There are critical distinctions between *Gaston* and the statute involved there which make *Gaston*'s strict-compliance holding inapplicable to the habitual-offender statute.

1. *Gaston* did not even cite MCL 769.26.

This Court asked the parties to consider *Gaston*, and also MCL 769.26 and MCR 2.613. Applying a harmless-error review here under MCL 769.26 would in no

[51] *Gaston*, 496 Mich at 323.

way conflict with *Gaston*, since the latter did not even cite or consider the applicability of that statute.[52]

2. MCL 769.26 is in the same chapter of the Code of Criminal Procedure as the habitual-offender statute; the bail-bond statute is not.

It would be reasonable to assume the Legislature intended MCL 769.26 to apply to the review of alleged errors in complying with the habitual-offender statute, since they are both in Chapter 769 (or Chapter IX) of the Code of Criminal Procedure. The bail-bond statute is in Chapter 756 (or Chapter V).

3. The present question involves early, not late, service of the notice.

In *Gaston*, the surety was harmed by the extremely late notice. The issue here involves early notice which resulted in no harm.

4. Unlike a defendant, the surety is not a party and does not appear regularly in court.

The person (or entity) whose rights are being safeguarded by the two notice requirements differ in a crucial way. The notice to the surety pertains to a non-party to the underlying criminal action. Since the surety is not a party, it does not appear

[52] *Gaston* briefly referenced MCR 2.613 in a footnote to refute the People's reliance on it. The Court, notably, quoted the rule in finding that not correcting the trial court's error would be "inconsistent with substantial justice . . ." *Gaston*, 496 Mich at 336 n 6 (internal quotation to MCR 2.613 omitted). In other words, it *applied* the harmless-error rule in rejecting the People's argument, rather than finding the rule did not apply.

in court for each hearing and is not privy to case developments, including whether defendant has absconded.[53] It has no way of learning this *except by* the required notice. In other words, the notice is the sole way to satisfy the bail-bond statute's purpose of safeguarding the surety's right to protect its financial interest. In contrast, a defendant is a party, appears in court for each pretrial hearing, and hears all the discussions and developments. Hence a defendant has other ways of learning—at an early stage in the case—that he faces enhanced sentencing.

5. A defendant is, at a minimum, aware of his prior convictions; the surety's notice contains new information previously unknown to it.

The notice to the surety provides *new* information (that is, that defendant has failed to appear) which is otherwise not known to it. In contrast, a defendant is aware of his prior convictions, and will learn after discussions with his attorney—which occur *at least* by the AOI, if not the preliminary exam—that prior convictions can result in enhanced sentencing.

[53]Hence, the "*In Re*" title of the case. The surety is a "claimant," not a party. See also, the newly released opinion of *In re Forfeiture of Bail Bond (People v Stanford)*, __ Mich App __ ; __ NW2d __ (2016) (Docket No. 328784), where the Court of Appeals cited *Gaston* for the proposition that the bail bond statute's "purpose was to protect public interest, as well as the rights of third persons." *Id*., slip op at 3. In contrast, MCL 769.13 protects the defendant and no removed third parties.

6. The surety has a more pressing need to receive the information immediately.

Time is of the essence for a surety "to promptly initiate a search for the defendant, which is obviously significant to the surety"[54] so it can be discharged from responsibility on the bond when defendant has been returned to custody. A surety will almost certainly forfeit its money if it does not immediately begin searching for defendant. Notice to a defendant of enhanced sentencing is certainly time-sensitive as well, for example in considering plea offers, but not to the extreme degree a surety's notice is.

7. The amendments to each of the statutes indicate different legislative intents, one statute becoming more, and the other less, restrictive.

This Court in *Gaston* noted the legislature amended the bail-bond statute to (1) *decrease* the amount of time the trial court had in which to give the surety notice, from twenty to seven days, and (2) change the language from the permissive "*may* give the surety . . . twenty days' notice," to the mandatory "*shall* give each surety immediate notice not to exceed 7 days . . . "[55]

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[54] *Gaston*, 496 Mich at 330.

[55] *Gaston*, 496 Mich at 328, quoting from an amendment to MCL 765.28(1) (emphasis in *Gaston*; internal quotation omitted).

Before the 1994 amendment to MCL 769.13 which governs today, the habitual-offender statute contained no time period in which the defendant needed to be given notice of sentence enhancement. In *People v Shelton*,[56] this Court set the time period for giving such notice at 14 days after the AOI.[57] The 1994 amendment to the habitual-offender statute codified—and increased—the time period to 21 days.[58] In *People v Morales*,[59] the Court explained: "The expansion of the time allotted from fourteen to twenty-one days signifies a desire to balance the credible concern of prosecutors that their ability to charge a defendant as an habitual offender not be undercut by too short a period, with the equally credible concern of defendants that they be given adequate notice to meet the charges against them."[60] Thus, the legislature in the 1994 amendment expanded the time period so as not to "undercut"

[56]*People v Shelton*, 412 Mich 565 (1982).

[57]The *Shelton* Court held that such notice (which was placed on a supplemental information) "is filed 'promptly' if it is filed not more than 14 days after defendant is arraigned in circuit court . . . ." *Shelton*, 412 Mich at 569.

[58]MCL 769.13(1), as amended by PA 1994 No. 110.

[59]*People v Morales*, 240 Mich App 571 (2000).

[60]*Morales*, 240 Mich App at 584.

the prosecution's charging time frame, while in the bail-bond statute, the legislature greatly reduced the court's notice period. These opposite legislative intents undermine *Gaston*'s applicability here.

8. While the habitual-offender statute contains mandatory language as in *Gaston*, that lone similarity should not dictate the standard of review.

The *Gaston* Court discussed the distinction the Court of Appeals drew in *In Re Forfeiture of Bail Bond (People v Moore)*[61] between "directory" versus "mandatory" statutory language.[62] The *Gaston* Court overruled *Moore*'s conclusion that the bail-bond statute's notice provision was "directory," finding the *Moore* Court had

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[61] *In Re Forfeiture of Bail Bond (People v Moore)*, 276 Mich App 482 (2007), overruled by *In re Forfeiture of Bail Bond (People v Gaston)*, 496 Mich 320, 339 (2014).

[62] *Moore* adopted this distinction from 3 Sutherland, § 57:19, pp 72–74, which stated, in part:

> [T]ime provisions are often found to be directory where a mandatory construction might do great injury to persons not at fault, as in a case where slight delay on the part of a public officer might prejudice private rights or the public interest. The general rule is that if a provision of a statute states a time for performance of an official duty, without any language denying performance after a specified time, it is directory. However, if the time period is provided to safeguard someone's rights, it is mandatory, and the agency cannot perform its official duty after the time requirement has passed. [Sutherland quotation is from *Gaston*, 496 Mich at 329-330.]

overlooked a critical exception to the general rule stated in the treatise it relied on, Sutherland, that is, if the time period is provided to safeguard someone's rights, it is mandatory, and the agency cannot perform its official duty after the time requirement has passed.[63] The *Gaston* Court concluded this exception applied to the bail-bond statute, making its language mandatory: "This exception to Sutherland's general rule would certainly apply in this case because the time period at issue [in the bail-bond statute] was clearly "'provided to safeguard someone's rights.'"[64]

So too, the habitual-offender statute's time period is provided to safeguard someone's rights; it protects a defendant's right to be promptly made aware of sentencing penalties. The cases are otherwise distinct, though, and the mandatory-language similarity should not trump the differences between the cases. For all the reasons discussed above, a defendant's rights under the habitual-offender statute are still safeguarded under a harmless-error standard of review, unlike in *Gaston*.

[63] *Gaston*, 496 Mich at 330.

[64] *Gaston*, 496 Mich at 330.

III.

An error in anything done or omitted by a party is harmless unless it results in a miscarriage of justice or, stated differently, unless refusal to grant relief would be inconsistent with substantial justice. Here, defendant was not prejudiced by any lack of proper service or proof thereof, since he had actual notice of the enhancement *before* the AOI, and counsel waived the reading of the information, suggesting he had a copy of it. Any error was harmless.

Standard of Review

This issue is preserved since defendant filed a timely circuit motion for resentencing in which he claimed the prosecution did not timely serve him with the habitual-offender notice. 2/28, 3-4. The trial court found the People had complied with the habitual-offender statute and found no error. For the reasons stated in issue II, the People contend the harmless-error standard of review applies to alleged errors in the service of a habitual-offender notice. The People include issue III in the event this Court finds an error in the service of the notice and agrees the harmless-error standard applies.

Discussion

The harmless-error review should apply here, and defendant was not prejudiced since he had actual notice of the enhancement *before* the AOI and the notice did not subsequently change, and counsel waived the reading of the information, suggesting he had a copy of it.

The People cannot represent when defendant was served with a written copy of the habitual-offender notice enhancement, or if he in fact was, because the prosecution did not file a proof of service. It is the People's position, though, for the reasons shown below, that the record reflects—at a minimum—actual notice to defendant, and the strong likelihood that defense counsel had the felony information at least by the preliminary examination. The notice was never amended after that. Thus, any error in complying with the statute was harmless.

A. Defendant has never challenged the accuracy of the enhancement notice.

Defendant has never claimed any of the information in the habitual-offender notice was incorrect, nor has he identified any harm he suffered as a result of receiving actual notice (either oral, written, or both) before the AOI.

B. The three charging documents each contained the enhancement notice, which never changed thereafter to increase his potential punishment.

MCL 769.13 does not specify on which document the enhancement notice must be placed. The Wayne County Prosecutor's Office has chosen to place the notice directly on the charging documents (the felony warrant, the felony complaint, and the felony information) to ensure the notice is timely served, and to notify defendant as soon as possible of the possible enhancement.[65] All three of the charging documents are prepared at the same time, that is, when the warrant prosecutor has decided what charges to recommend, and their contents are "carbon copies" of one another.[66] The charging documents in this case were each dated May 24, 2013. Defendant does not dispute that each of them contained the enhancement notice, *and* that the notice never changed after that to increase his offender level.

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[65]If a defendant's habitual-offender status is not apparent when the charging documents are prepared (which was not the case here), it is the practice in this county to add the enhancement notice later in an amended information, but still within 21 days after the AOI or, if waived, the filing of the original information.

[66]While the information will usually have the same date as the other charging documents (as it did here), the document does not take effect until defendant is bound over at the preliminary examination. It is then signed and filed at the AOI.

C. The prosecution filed the enhancement notice in district court when it presented the complaint and warrant to the magistrate for his signature.

The circuit Register of Actions reflects that the "Recommendation for Warrant" and a "Habitual Offender" notice were filed in district court on May 24, 2013. The Register then shows the warrant was "signed" (actually, signed and then issued[67]) by the magistrate on the same date. Thus, contrary to defendant's claim, the enhancement notice *was* filed, and it was filed earlier than required.

D. Defendant received actual notice of the enhancement at his arraignment on the warrant.

Defendant was arraigned on the warrant via video on May 25, 2013.[68] There were no attorneys present for either side.[69] The district court read the charges and penalties to defendant, *including the habitual offender third notice*. Defendant acknowledged he heard the charges *and* penalties. Specifically:

> THE CLERK: Thank you, case number 13-58994. The People of the State of Michigan versus Phillip Joseph Swift. The Defendant is charged with Count one, Armed Robbery. The penalty is life. Count two, Home Invasion First Degree. The penalty is 20 years and/or five thousand

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[67]The AOW could not have been held until the magistrate issued the warrant. MCR 6.104(B) and (D).

[68]He was in custody on another matter.

[69]A defendant is not constitutionally entitled to appointed counsel at the AOW. *People v Horton*, 98 Mich App 62, 72 (1980).

> dollars. Count three, Unarmed Robbery. The penalty is 15 years, DNA is to be taken upon arrest. Count four, Firearm Weapons discharged in or at a building. The penalty is 4 years and/or two thousand dollars mandatory forfeiture of weapons or device. Count number five, Felony Firearm Weapons. The penalty is two years. *The Defendant has a second offense notice also a habitual third offense notice. The defendant is present.*
>
> THE COURT: Sir, state your name.
>
> THE DEFENDANT: Phillip Joseph Swift.
>
> THE COURT: And you heard the charges that were read *and the penalties you could receive*?
>
> THE DEFENDANT: Yes. [5/25, 3 (emphasis added).]

The above exchange proves defendant was put on notice, even if only orally, that he faced enhanced sentencing as a habitual offender.[70]

[70]In the Court of Appeals defendant acknowledged receiving actual notice in district court, although his second sentence seems to contradict the first one: "Contained in the warrant information filed in the *district court*, Mr. Swift *was put on notice* that upon conviction, the prosecutor would be seeking enhancement of his sentence as a third habitual offender, pursuant to MCL 769.11. Mr. Swift disputes whether this notice was provided to him in the district court or the circuit court." Defendant's Court of Appeals brief, p 4 (emphasis added).

E. The preliminary examination transcript confirms that defense counsel had a copy of the enhancement notice, since she clearly had a copy of the charges.

By the preliminary examination, the record confirmed that defense counsel (and thus defendant) had a copy of the either the felony warrant, the complaint, the information, or all three, since counsel objected to the prosecutor's request to amend the armed-robbery count (I). 6/6, 29.[71] The prosecutor wanted to add a vase as one of the dangerous weapons listed in that count, and defense counsel objected to the original weapon listed (a gun), never claiming she had not received a copy of the charges in either the felony warrant, complaint, or information:

> [DEFENSE COUNSEL]: Your Honor, *with respect to Count one, I would respectfully object*, and I don't believe that specifically as to a gun, there's no such testimony supporting that. Mr. Smith indicates that there is a gun five to ten minutes later, that's when that came in, when somebody left and according to his testimony that person came back.
>
> THE COURT: Okay.

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[71]The prosecutor later filed a signed, amended felony information on September 3, 2013, which added an additional weapon (vase) used during the armed robbery. The habitual notice remained the same. See Appendix B.

At trial on September 5, 2013, the prosecutor requested that the felony information be amended again to change the incident location's apartment number from 13 to 14. Defense counsel did not object, and the court allowed the amendment; it appears the change was only hand-written on the (already) amended information, rather than the amended information being formally corrected again. 9/5, 149.

> [DEFENSE COUNSEL]: Your Honor, I would argue that there may be a question of fact *as to the Count three, not as to Count one*, that's my argument. And other than that, I'm in an unfortunate position of indicating that these are questions of fact. [6/6, 29-30 (emphasis added).]

Logically, since defense counsel could discuss both Counts I and III, she must have received a copy of the charges in at least one, if not all, of their three written formats (warrant, complaint, or information). Since each of these documents contained the enhancement notice, defense counsel must have had a copy of the notice as well. Thus, defendant was on notice at least by this date of the sentence enhancement.

F. The prosecution filed the enhancement notice in circuit court at the AOI.

The People complied with the habitual-offender filing requirement by filing the enhancement notice at the AOI on June 13, 2013. The trial court expressly found at the post-sentencing motion hearing that the information was "in fact in the court file" at the AOI. 2/28, 6. Thus, even under a literal reading of the "within 21 days after" rule, this filing was timely, not early, and the document was accessible to defense counsel if he did not already have it.[72]

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[72]In the recently decided case of *People vNorfleet*, __ Mich App __ ; __ NW2d __ (2016) (Docket No. 328968), defendant alleged the prosecution did not timely serve him with the habitual-offender notice. The Court of Appeals upheld the sentence enhancement based solely on the fact that the felony information which

G. Defense counsel waived the reading of the information at the AOI.

If defense counsel had not yet been served with a copy of the Information, it would seem logical he would have said so at the AOI instead of waiving the reading of a document he had not seen. 6/13, 3. And if counsel's waiver was based on a knowledge of the charges rather than on having seen the felony information, whatever charging document he had seen also contained the enhancement notice.[73] There is simply no indication defense counsel did not have a copy of the information containing the enhancement notice at the AOI.

H. When the court mentioned defendant's status as a habitual-third offender at sentencing, neither counsel nor defendant objected.

At sentencing, both defense counsel and defendant confirmed the accuracy of the presentence investigation report after "careful examination . . . ." 9/23, 3. Further, neither counsel nor defendant spoke up to contest the accuracy of the habitual-offender notice, or defendant's status as habitual-third offender when the court

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contained the notice was dated March 24, 2015 and the AOI occurred on March 26, 2015. The Court did not determine whether the notice had been filed or served, but concluded that since service may occur at the AOI, defendant "had notice of the prosecution's intent to seek sentencing enhancement at his arraignment . . ." *Id*., slip op at 4. This reasoning equally applies here.

[73]And if counsel had not seen any charging document and still waived the reading of the information, then this calls into question counsel's performance, not the prosecutor's.

mentioned this. 9/23, 11. Defense counsel merely mentioned, at that point, that enhanced sentencing was within the court's discretion. 9/23, 11.

Thus, while defendant clings to a strict reading of the habitual-offender statute, the prosecution more than complied with the statute's purpose to give prompt notice, by including the notice on each charging document from the day he was charged and never changing his offender level thereafter. As the Court of Appeals noted, defendant has never argued "that he had any viable challenge to the habitual offender enhancement."[74] Nor does he now.

In sum, defendant was put on notice in a timely manner—early even—that he face enhanced sentencing, and he has not challenged the accuracy of the notice. Any error in complying with the habitual-offender statute was harmless.

[74] *Swift*, p 3.

RELIEF

WHEREFORE, the People ask this Honorable Court to deny defendant's application for leave to appeal in its entirety without granting relief. Alternatively, if this Court grants the application, the People ask this Court to affirm the Court of Appeals decision of February 19, 2015.

Respectfully submitted,

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January 17, 2017

STATE OF MICHIGAN
IN THE SUPREME COURT

THE PEOPLE OF THE STATE OF MICHIGAN
Plaintiff-Appellee,

v

Supreme Court
No. 151439

PHILLIP JOSEPH SWIFT,
Defendant-Appellant.

Court of Appeals No. 318680
Wayne Circuit Court No. 13-005130-01-FC
(Hon. Timothy M. Kenny)

PLAINTIFF-APPELLEE'S SUPPLEMENTAL BRIEF IN OPPOSITION TO DEFENDANT'S APPLICATION FOR LEAVE TO APPEAL

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COUNTERSTATEMENT OF JURISDICTION

Defendant-Appellant did not include a statement of jurisdiction in his supplemental brief. This Court has jurisdiction to consider his application for leave to appeal pursuant to MCR 7.303(B)(1).

COUNTERSTATEMENT OF ISSUES PRESENTED

I.

A habitual-offender notice must be served "within 21 days after the arraignment on the information" so that a defendant is promptly notified he faces an enhanced sentence. It is reasonable to construe the term "within" as allowing service any time after a defendant is charged, as long as service occurs before the end of the time period, that is, 21 days after the AOI. Does service of the notice before the AOI comply with the statute's language and intent?

The trial court was not asked this question.
The Court of Appeals was not asked this question.
The People answer: "YES"
Defendant answers: "NO"

II.

MCL 769.26 provides for harmless-error review of any error in "pleading or procedure," and MCR 2.613 permits harmless-error review for anything "done or omitted" by "the parties." An alleged defect in the service of a habitual-offender notice is an error by a party, the prosecution, in its pleading and procedure. Is a preserved claim that the notice was not properly served subject to harmless-error review?

The trial court found no error.
The Court of Appeals answered: "YES"
The People answer: "YES"
Defendant answers: "NO"

III.

An error in anything done or omitted by a party is harmless unless it results in a miscarriage of justice or, stated differently, unless refusal to grant relief would be inconsistent with substantial justice. Here, defendant was not prejudiced by any lack of proper service or proof thereof, since he had actual notice of the enhancement *before* the AOI, and counsel waived the reading of the information, suggesting he had a copy of it. Was any error harmless?

The trial court found no error.
The Court of Appeals answered: "YES"
The People answer: "YES"
Defendant answers: "NO"

INTRODUCTION

MCL 769.13 is satisfied as long as the prosecution provides notice of habitual-offender sentence ramifications "within 21 days after" the defendant's arraignment on the information. That is, the statute identifies only the *end* of the period within which a habitual-offender notice must be served. Service of the notice before the AOI complies with the statute's language and intent.

In this case, defendant was informed well before the deadline that the prosecution had charged him as a habitual-third offender; he also acknowledges that he is, in fact, a three-time felon. Nevertheless, he maintains that he could not be sentenced as a repeat offender because the notice came too early, because it may not have been provided in writing, and because the prosecution never filed a proof of service.

But none of these objections holds water. There is no such thing as legal notice that arrives too early, and the statute in question does not support, much less require, that interpretation. That is, the notice here *was* clearly filed "within 21 days after" the arraignment on the information, as that phrase is properly understood. Additionally, since the enhancement was included on the information—which defendant chose to waive the reading of—the record below supports the inference that he *did* have written notice. Third, although the People did not file a proof of service, the lack thereof does

not foreclose the application of the habitual-offense statute. In any event, since defendant had actual notice and admits he is a repeat offender, any error is harmless as a matter of law.

An alleged defect in the service of a habitual-offender notice is an error by a party—the prosecution—in its pleading and procedure and is thus subject to harmless-error review. Specifically, MCL 769.26 provides for harmless-error review of any error in "pleading or procedure," and MCR 2.613 permits harmless-error review for anything "done or omitted" by "the parties." The strict-compliance holding of *In re Forfeiture of Bail Bond (People v Gaston)*, 496 Mich 320, 330 (2014), does not undermine the above: *Gaston* is not on point and is distinguishable on numerous grounds, including that this Court was interpreting a different statute in a different chapter of the Code of Criminal Procedure which protected different rights of removed third parties, rather than a criminal defendant's. Indeed, this Court has already applied a harmless-error standard in reviewing a habitual-offender notice claim.

Here, defendant received actual notice that he faced enhanced sentencing as a habitual-third offender from his arraignment on the warrant. That notice was factually accurate from the inception of the case, never changed thereafter, was on all three

charging documents, and defendant has never claimed otherwise. Even if there was error in service of the notice or filing a proof of service, it was harmless.

COUNTERSTATEMENT OF FACTS

On May 24, 2013, the Wayne County Prosecutor's Office recommended charges against defendant for armed robbery,[1] first-degree home invasion,[2] unarmed robbery,[3] intentional discharge of a firearm at a dwelling or occupied structure,[4] and felony-firearm, second offense.[5] Each of the three charging documents (the felony warrant, complaint, and information) also contained a habitual-offender third-offense notice which notified defendant that he faced enhanced sentencing as a habitual offender.[6]

Defendant was arraigned on the warrant on May 25, 2013. The magistrate read the charges *and the enhanced sentencing penalties* defendant faced, and defendant

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[1]MCL 750.529.

[2]MCL 750.110a(2).

[3]MCL 750.530.

[4]MCL 750.234b.

[5]MCL 750.227b.

[6]The three documents are attached as Appendix A. An amended information (with no changes to the habitual notice) is attached as Appendix B.

acknowledged he heard them. 5/25, 3. The circuit court Register of Actions contains an entry called "Habitual Offender," reflecting the enhancement notice was in fact filed with the charging documents on May 24, 2013 in district court.[7]

At the preliminary examination on June 6, 2013, when discussing changes to the felony information counsel did not state she lacked a copy. 6/6, 29. After defendant was bound over, defense counsel waived the reading of the felony information at the arraignment on the information ("AOI") in circuit court on June 13, 2013,[8] and the information was filed with the court that day. 6/13, 3; 2/28/14, 6. Accordingly, copies of the notice of enhancement were filed with both the district and circuit court, not just "within 21 days after the" AOI, but by that date.

On September 6, 2013, a jury convicted defendant of unarmed robbery and first-degree home invasion.[9] He was sentenced on September 23, 2013 within the guidelines as a habitual-third offender to 12-30 years and 12-40 years imprisonment, respectively.[10] 9/23, 15. He filed a motion for resentencing on February 28, 2014,

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[7]The Register of Actions is attached as Appendix C.

[8]At the AOI, a different defense counsel stood in for the preliminary-exam defense counsel.

[9]On July 17, 2013, a new defense counsel was assigned.

[10]At sentencing a new defense counsel substituted in for the trial counsel and filed an appearance.

Defendant was sentenced on the guidelines' B Grid, cell E-IV. His minimum

arguing that he was not provided the proper notice of his sentence enhancement. The trial court denied the motion, finding that the People had complied with the notice requirement and defendant was, in fact, on notice of the habitual-third enhancement at the arraignment on the information: "The copy of the Information was in fact in the court file on that particular day." 2/28, 6. The court concluded: "I do think that there has been compliance. The defendant was on notice with regards to the habitual in this matter." 2/28, 7.

Defendant appealed to the Court of Appeals, arguing (1) that he was entitled to resentencing because he did not receive proper notice of the third-habitual-offender notice, and (2) that he was denied the right to present a defense because of an evidentiary ruling by the court. The Court of Appeals affirmed defendant's convictions and sentence, rejecting both arguments. Regarding the first issue, the Court found that (1) the prosecution fulfilled its obligation under MCL 769.13 to file a written notice by filing the notice both in district and circuit court, and (2) defendant had actual knowledge of the prosecutor's intent to seek an enhanced sentence, and the notice was also written on the three charging documents, to which defendant had

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sentence range without enhancement would have been 84-140 months. As a habitual-third offender, his minimum range was 84-210 months. His minimum sentence on each of the two convictions was 12 years (144 months). 9/23, 15. As a habitual-third offender he also faced, and received, double the maximum sentence on each of the two convictions. MCL 769.11(1)(a).

access, and (3) to the extent defendant argued that there was no proof of service as required by MCL 769.13, any such error was harmless because (a) defendant was nevertheless provided notice, (b) never objected at sentencing to being sentenced as a third habitual offender, and (c) did not contend he "had any viable challenge to the habitual offender enhancement."[11]

Defendant filed a pro per application for leave to appeal with this Court. This Court, in turn, issued an order directing the People to answer the application:

> In particular, we direct the prosecutor to respond to the question whether the defendant or his attorney was personally served with a copy of the information containing the habitual offender notice at the arraignment. If not, the prosecutor is directed to explain when and how the habitual offender notice was served on the defendant or his attorney. [MSC Order dated April 6, 2016.]

The People responded that written notice of the enhancement was included on all the charging documents, and filed in both district and circuit court by the AOI date. While the People did not file a proof of service, the People contended this error was harmless because defendant was provided—from the inception of the case—with actual notice of the enhancement.

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[11] *People v Swift*, unpublished opinion per curiam of the Court of Appeals, issued February 19, 2015 (Docket No. 318680), pp 2-3, attached as Appendix D.

This Court scheduled oral argument on whether to grant the application or take other action, ordering the parties to file supplemental briefs addressing:

> (1) whether serving the habitual offender notice prior to the defendant's arraignment on the information satisfies the 21-day time requirement under MCL 769.13, and (2) if not, whether the harmless error rules apply to the failure to serve the habitual offender notice within the 21-day time requirement under MCL 769.13. With regard to the latter issue, see *In re Forfeiture of Bail Bond*, 496 Mich 320, 330 (2014); see also MCL 769.26 and MCR 2.613. [MSC Order dated October 12, 2016.] The People answer (1) Yes and (2) Yes as elaborated in issues I and II of this brief, and also contend in issue III that any error was harmless.

ARGUMENT

I.

A habitual-offender notice must be served "within 21 days after the arraignment on the information" so that a defendant is promptly notified he faces an enhanced sentence. It is reasonable to construe the term "within" as allowing service any time after a defendant is charged, as long as service occurs before the end of the time period, that is, 21 days after the AOI. Service of the notice before the AOI complies with the statute's language and intent.

Standard of Review

An issue involving the interpretation of a statute is a question of law which this Court reviews novo.[12]

Discussion

Since MCL 769.13 identifies only the end of the period "within" which a habitual-offender notice must be served, it is reasonable to construe the language as allowing service any time after a defendant is charged, as long as service occurs before the end of the time period, i.e., 21 days after the AOI. Service of the notice before the AOI complies with the statute's language and intent.

[12] *People v Gardner*, 482 Mich 41, 46 (2008).

This Court's goal in construing a statute is "to ascertain and give effect to the intent of the Legislature."[13] The "touchstone of legislative intent is the statute's language."[14] This Court interprets the statute's words "in light of their ordinary meaning and their context within the statute and read[s] them harmoniously to give effect to the statute as a whole."[15] Every word should be given meaning.[16] If the statute's language "is clear and unambiguous," this Court assumes "that the Legislature intended its plain meaning" and it enforces the statute as written.[17] When statutory language is unambiguous, judicial construction is not required or permitted because this Court presumes the legislature intended "the meaning that it plainly expressed."[18] Nonetheless, statutory language should be construed reasonably, keeping in mind the statute's purpose, "to avoid absurd results."[19]

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[13]*People v Gardner*, 482 Mich 41, 50 (2008) (citation and internal quotation omitted), interpreting the statute at issue here, MCL 769.13.

[14]*Gardner*, 482 Mich at 50.

[15]*People v Peltola*, 489 Mich 174, 181 (2011).

[16]*Peltola*, 489 Mich at 181.

[17]*Gardner*, 482 Mich at 50 (citation and internal quotation omitted).

[18]*Peltola*, 489 Mich at 181; *Gardner*, 482 Mich at 50.

[19]*People v Hutcheson*, 308 Mich App 10, 13 (2014) (internal quotation and citation omitted), interpreting the sentencing guidelines.

MCL 769.13, governing habitual-offender sentence enhancement notices, requires written notice of an enhanced sentence to be filed "within 21 days after" the defendant's arraignment on the information or, if the arraignment is waived, within 21 days after the filing of the information:

> (1) In a criminal action, the prosecuting attorney may seek to enhance the sentence of the defendant as provided under section 10, 11, or 121 of this chapter, by filing a written notice of his or her intent to do so within 21 days after the defendant's arraignment on the information charging the underlying offense or, if arraignment is waived, within 21 days after the filing of the information charging the underlying offense.
>
> (2) A notice of intent to seek an enhanced sentence filed under subsection (1) shall list the prior conviction or convictions that will or may be relied upon for purposes of sentence enhancement. The notice shall be filed with the court and served upon the defendant or his or her attorney within the time provided in subsection (1). The notice may be personally served upon the defendant or his or her attorney at the arraignment on the information charging the underlying offense, or may be served in the manner provided by law or court rule for service of written pleadings. The prosecuting attorney shall file a written proof of service with the clerk of the court.[20]

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[20]MCR 769.13(1) and (2). MCR 6.112(F) is the court-rule counterpart to MCL 769.13 and uses the same language at issue here. It states in pertinent part: "The notice must be filed within 21 days after the defendant's arraignment on the information charging the underlying offense or, if arraignment is waived or eliminated as allowed under MCR 6.113(E), within 21 days after the filing of the information charging the underlying offense."

The purpose of requiring the prosecutor to promptly file the enhancement notice "is to provide the accused with notice, at an early stage in the proceedings, of the potential consequences should the accused be convicted of the underlying offense."[21]

A. It is reasonable to conclude the Legislature intended to allow service of the notice from the start of the case until 21 days after the AOI.

This Court has asked whether serving the habitual-offender notice before the AOI complies with MCL 769.13. The habitual-offender statute's 21-day time limit is the *end* of the time period "within" which the notice must be served. This countdown is triggered by the AOI date or, if the AOI is waived, by the filing of the information.[22] An information can be filed as soon as the preliminary examination is held (or waived) and defendant is bound over.[23] Since a defendant can waive the AOI

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[21]*People v Shelton*, 412 Mich 569 (1982) (assessing whether the prosecutor proceeded "promptly," and creating the 14-day notice rule since there was no time period stated in MCL 769.13 until 1994); *People v Morales*, 240 Mich App 571, 582 (2000).

[22]MCL 769.13(1). For ease of reference going forward, a reference to "AOI" in the context of the habitual-offender notice also includes the alternate scenario where a defendant waives the AOI and the information filing date triggers the 21-day end of the filing period.

[23]MCL 767.42(1) states, in pertinent part: "An information shall not be filed against any person for a felony until such person has had a preliminary examination therefor, as provided by law, before an examining magistrate, unless that person waives his statutory right to an examination." And MCR 6.112(C) provides: "The prosecutor must file the information or indictment on *or before* the date set for the arraignment [emphasis added]."

at the preliminary examination,[24] giving a defendant the required enhancement notice by the preliminary exam date certainly is not prohibited by the habitual-offender statute. And since a defendant can also seek permission to waive a preliminary exam,[25] it is conceivable a defendant could waive both the preliminary exam and the AOI.[26]

In describing a time period, the term "within" usually denotes a discrete beginning and ending. The term is not defined in the habitual-offender statute. Applying "common sense,"[27] the People suggest the Legislature intended that this time period could *begin* at the inception of the case, as long as the enhancement notice was served by the *end* of the time period, that is, "21 days after" the AOI. The statute puts no limitation on how *early* the notice can be served. There is no reason to read the provision as preventing notice from being given before the AOI.

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[24]MCR 6.110(A). Also, MCR 6.113(C) states a defendant may waive the AOI in writing "at or before the time set for the arraignment [on the information] . . . ."

[25]MCR 6.110(A).

[26]Effective January 1, 2015, MCR 6.108 established a probable-cause conference ("PCC") held after the arraignment on the warrant ("AOW"). The PCC rule permits a defendant to waive either the PCC, the preliminary exam, or both. MCR 6.108(A).

[27]*In re Forfeiture of Bail Bond (People v Stanford)*, __ Mich App __ ; __ NW2d __ (2016) (Docket No. 328784); slip op at 3: "In interpreting a statute, we apply the rule of ordinary usage and common sense."

In sum, to read the statute as penalizing the prosecution for complying with the notice requirement immediately—especially if nothing in the notice changes thereafter—would elevate form over substance and ignore common sense.[28]

B. There is no sound reason to read the statute as precluding service of the enhancement notice before the AOI.

It defies logic for a defendant to complain, under any circumstances, that he or she received a valuable piece of legal information too soon. Keeping in mind the purpose of the habitual-offender notice requirement—to put defendant on notice as soon as possible that he faces enhanced sentencing—such a claim loses even more ground, and makes it highly unlikely the Legislature intended such a limiting interpretation of the service period.

Defendant responds that "[f]iling the Information and/or habitual offender notice in the District Court is of no consequence as the District Court does not have jurisdiction over trials and sentences of felonies. . . .This being the case, the filing of the Habitual Offender notice prior to the Circuit Court arraignment on the information

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[28]To the extent this Court is concerned that a habitual-offender notice served before the AOI would be premature because it could later change, this concern is addressed by the very language at issue, that is, the so-called "bright-line" 21-day requirement that prevents any changes to the notice after that date which increase the penalties a defendant faces (as discussed *infra*). *People v Ellis*, 224 Mich App 752, 755 (1997); *People v Morales*, 240 Mich App 571, 575 (2000). This is when the 21-day limit comes into play more meaningfully, by protecting a defendant from late service of an amended notice which increases his potential punishment.

is meaningless."[29] Following defendant's logic, nothing pertaining to felony charges should be filed in district court, and, if they are, they are meaningless. This, of course, is not true, since it is in district court that the charges are initially filed and a determination made whether probable cause to support them exists.[30] Appellant cannot explain why a defendant can only receive notice of a sentence enhancement in circuit court, as if the exact same notice, if provided in district court, somehow does not convey the same information.

Defendant futilely attempts to turn early notice of valuable information into a "negative" instead of the "positive" it clearly is. Early notice of enhanced sentencing could help a defendant decide whether to plea, and possibly whether to waive either the probable cause conference, the preliminary exam, the AOI, or all three.[31] Further, it gives him additional time to challenge any prior convictions in the enhancement

[29]Defendant's supplemental brief in support of his ALA, p 12.

[30]The People are not contending that the Felony Information takes effect before a defendant is bound over. But here it is an enhancement notice at issue, which is not only on the felony information but on all the charging documents.

[31]MCR 6.108(A); MCR 6.110(A); MCR 6.113(C).

notice he may be contesting, as provided for in MCL 769.13(4) and (6).[32] There is no downside to early notice of sentence enhancement, despite defendant's attempt to create one.

[32]MCL 769.13(4) provides in pertinent part: "A defendant who has been given notice that the prosecuting attorney will seek to enhance his or her sentence . . . may challenge the accuracy or constitutional validity of 1 or more of the prior convictions listed in the notice by filing a written motion with the court . . . ." MCL 769.13(6) provides in pertinent part: "The defendant, or his or her attorney, shall be given an opportunity to deny, explain, or refute any evidence or information pertaining to the defendant's prior conviction or convictions before sentence is imposed, and shall be permitted to present relevant evidence for that purpose."

II.

MCL 769.26 provides for harmless-error review of any error in "pleading or procedure," and MCR 2.613 permits harmless-error review for anything "done or omitted" by "the parties." An alleged defect in the service of a habitual-offender notice is an error by a party, the prosecution, in its pleading and procedure. Thus, a preserved claim that the notice was not properly served is subject to harmless-error review.

Standard of Review

Issues involving the interpretation of statutes and court rules are questions of law which this Court reviews novo.[33]

Discussion

MCL 769.26 provides for harmless-error review of any error in "pleading or procedure," and MCR 2.613 permits harmless-error review for anything "done or omitted" by "the parties"; an alleged defect in the service of a habitual-offender notice is an error by a party, the prosecution, in its pleading and procedure and is thus subject to harmless-error review.

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[33] *People v Gardner*, 482 Mich 41, 46 (2008); *People v Williams*, 483 Mich 226, 231 (2008). The same legal principles which govern the interpretation of statutes also apply when interpreting court rules. *Williams*, 483 Mich at 232.

For issue II, this Court asked the parties to answer "whether the harmless error rules apply to the failure to serve the habitual offender notice within the 21-day time requirement under MCL 769.13."[34]

A. The language in the harmless-error rules, and the caselaw interpreting them, support a finding that the rules apply to violations of the habitual-offender statute.

The harmless-error rule is codified in MCL 769.26 and MCR 2.613, which "present different articulations" of the same concept.[35] MCL 769.26 states:

> Sec. 26. No judgment or verdict shall be set aside or reversed or a new trial be granted by any court of this state in any criminal case, on the ground of misdirection of the jury, or the improper admission or rejection of evidence, or for error as to any matter of pleading or procedure, unless in the opinion of the court, after an examination of the entire cause, it shall affirmatively appear that the error complained of has resulted in a miscarriage of justice.

Similarly, MCR 2.613(A) states:

> **Harmless Error.** An error in the admission or exclusion of evidence, an error in a ruling or order, or an error or defect in anything done or omitted by the court or by the parties is not ground for granting a new trial, for setting aside a verdict or for vacating, modifying, or otherwise disturbing a judgment or order, unless refusal to take this

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[34]MSC Order dated October 12, 2016. This Court posed issue II in the event it was determined in issue I that service of an enhancement notice before the AOI is erroneous. In responding to issue II, the People do not concede this.

[35]*Williams*, 483 Mich at 232 (citation and internal quotation omitted).

> action appears to the court inconsistent with substantial justice.

A defect in the filing or service of a habitual-offender notice is an "error as to any matter of pleading or procedure" to which MCL 769.26 must be applied before a judgment (which a sentence is part of) is set aside. There is nothing in MCL 769.26 (or elsewhere) which excludes its application to the filing and service of habitual offender notices. Therefore, the "miscarriage of justice" standard applies when reviewing alleged violations of MCL 769.13. Similarly, the harmless-error rule in MCR 2.613(A) applies to "an error or defect in anything done or omitted" by "the parties."[36]

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[36]Defendant points to MCR 6.112(G), which (until 1-1-2017) excluded an untimely filing of an enhancement notice from that provision's harmless-error review:

> (G) Harmless Error. Absent a timely objection and a showing of prejudice, a court may not dismiss an information or reverse a conviction because of an untimely filing or because of an incorrectly cited statute or a variance between the information and proof regarding time, place, the manner in which the offense was committed, or other factual detail relating to the alleged offense. *This provision does not apply to the untimely filing of a notice of intent to seek an enhanced sentence.*

Michigan Court Order 16-0020 revised MCR 6.112 effective January 1, 2017, and one of the changes was deletion of the italized sentence above. The People contend that MCR 6.112(G) and its amendment have no bearing—good or bad—on this case. The last sentence was possibly deleted because it made no sense being there. If there is an error in the filing of a habitual-offender notice, the remedy is withdrawal of the notice

The Court of Appeals has held the habitual-offender statute's 21-day rule is a "bright-line test" for determining whether the prosecutor promptly filed a habitual-offender notice.[37] In those cases, though, the sentencing penalties defendant faced were increased after the 21-day period.[38] For example, in *People v Morales*,[39] the prosecution sought to increase defendant's enhancement from a second to a third habitual offender two months after the first notice was filed.[40] In contrast, a prosecutor *may* amend the enhancement notice to correct errors after the expiration of the 21-day period as long as the amendment does not increase the habitual-offender level, or otherwise "increase the sentencing consequences."[41] It follows that applying a harmless-error review is not inconsistent with the bright-line test. For example, if

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and, if withdrawn after sentencing, resentencing. In no case does the trial court "dismiss an information or reverse a conviction because of an untimely filing" of a habitual-offender notice. The removal of the last sentence could reflect this Court's agreement that it was out of place.

[37]*People v Ellis*, 224 Mich App 752, 755 (1997); *People v Morales*, 240 Mich App 571, 575 (2000).

[38]*Ellis*, 224 Mich App at 755; *Morales*, 240 Mich App at 573.

[39]*People v Morales*, 240 Mich App 571 (2000).

[40]*Morales*, 240 Mich App 571

[41]*People v Hornsby*, 251 Mich App 462, 472-473 (2002) (finding no prejudice when the convictions in the notice were corrected without increasing defendant's offender level).

a notice is untimely filed, and defendant had no actual notice of the sentence enhancement, the "bright-line" rule would govern, and prevent enhancement because the error was not harmless. Likewise, the bright-line rule would apply to prevent an amendment to a timely filed notice which seeks to increase a defendant's offender level after the 21-day period.

Finally, in *People v Walker*,[42] the Court of Appeals applied a harmless-error standard in reviewing a failure to file a proof of service of the habitual-offender notice.[43] *Walker* supports the People's position that the harmless-error rule applies as well to alleged errors in serving the habitual-offender notice.

B. This Court has already applied a harmless-error standard in reviewing a habitual-offender notice claim.

This Court has considered this issue before. In *People v Johnson*,[44] the prosecution filed a timely notice of habitual-fourth-offender enhancement and, then,

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[42]*People v Walker*, 234 Mich App 299 (1999).

[43]*Walker*, 234 Mich App at 314-315: "[A]ny error was harmless beyond a reasonable doubt. . . Defendant makes no claim that he did not receive the notice of intent to enhance . . . defense counsel admitted at the sentencing hearing that the notice of intent had been received . . ." The Court of Appeals found the failure to file the proof of service "in no way prejudiced defendant's ability to respond to the habitual offender charge." *Id*., 234 Mich App at 315.

See also, MCR 2.104(B): "Failure to file proof of service does not affect the validity of the service."

[44]*People v Johnson*, 495 Mich 919 (2013).

months after the 21-day window had passed, the trial court allowed an amendment to correct "the dates and convictions listed" in the notice. Defendant was sentenced accordingly, and the Court of Appeals affirmed. This Court granted leave; then, in a one-page order, it affirmed the Court of Appeals, finding defendant "was given timely notice of his enhancement level and had sufficient prior convictions to support a fourth habitual enhancement."[45] Citing MCL 769.26, this Court ruled there was "no miscarriage of justice when the trial court allowed the prosecution to amend the notice to correct the convictions . . . "[46] Similarly, citing MCR 2.613(A), this Court also ruled that affirming defendant's enhanced sentence was "not inconsistent with substantial justice."[47] Thus, in a one-paragraph order, this Court cited both harmless-error rules in denying relief. It would seem to follow both legally and logically that the two rules would apply to this case as well, since this case also involves an alleged violation of the habitual-offender statute.[48]

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[45] *Johnson*, 495 Mich at 919.

[46] *Johnson*, 495 Mich at 919.

[47] *Johnson*, 495 Mich at 919.

[48] In *People v Muhammad*, 497 Mich 988 (2015), this Court granted oral argument on whether to grant defendant's application for leave to appeal (a "MOAA"). Defendant there raised a similar argument as in this case: although he acknowledged that the felony complaint he received in district court contained a habitual-offender notice, he contended the People did not comply with MCL 769.13 because he was not timely served with the felony information which also contained

C. *In re Forfeiture of Bail Bond (People v Gaston)* is distinguishable on numerous grounds, and thus its strict-compliance holding should not apply to the habitual-offender statute.

This Court also asked the parties to consider *In re Forfeiture of Bail Bond (People v Gaston)*[49] in addressing issue II; in that case this Court strictly interpreted the notice provision of a different statute. *Gaston* involved the bail-bond statute, MCL 765.28, which requires the trial court to provide notice to a surety within seven days of a defendant's failure to appear, so the surety may appear in court to contest the forfeiture of whatever sum it posted on behalf of defendant.[50] Defendant failed to

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the (unchanged) enhancement notice. This Court asked the parties to brief whether "defendant's acknowledgment that he received a felony complaint" in district court which contained the notice satisfied MCL 769.13, and, if not, "the proper application of the harmless error tests" in MCR 2.613 and MCL 769.26 to violations of the notice requirements in MCL 769.13. At the MOAA the People (according to this Court's subsequent order) conceded they did not timely serve defendant with the habitual-offender notice. *People v Muhammad*, 498 Mich 909 (2015). This Court, *without ruling on the harmless-error issue*, vacated the Court of Appeals' holding that any error was harmless, ruling that the Court of Appeals first needed to determine whether the trial court's dismissal of the habitual-offender notice was erroneous before applying a harmless-error analysis. *Muhammad*, 498 Mich at 909. (On remand, the Court of Appeals found the trial court's dismissal was not erroneous.) Thus, in *Muhammad*, this Court never answered the question it originally posed, that is, whether the harmless-error rules in fact apply to alleged violations of MCL 769.13.

To clarify, to the extent the People in *Muhammad* conceded (and it is not clear they did) that defendant's receipt of the habitual notice in district court did not comply with MCL 769.13, the People here do not agree with that position.

[49] *In re Forfeiture of Bail Bond (People v Gaston)*, 496 Mich 320, 330 (2014).

[50] The notice is required seven days after a default is entered. MCL 765.28(1) states in pertinent part:

appear for trial, and the trial court ordered him rearrested and that his bond be forfeited. Three years later, the trial court sent notice to the surety to appear to show cause why it should not forfeit the amount it posted on behalf of defendant. The surety filed a motion to set aside the forfeiture due to the lack of timely notice; the trial court denied the motion and entered judgment against the surety for the amount of the bond it posted. The Court of Appeals rejected the surety's claim that the trial court's failure to provide timely notice barred forfeiture of the surety's bond.

This Court reversed, holding that when a statute requires a public officer to undertake certain action within a specified time period to safeguard another's rights, it is mandatory that the action be taken within that time period, "and noncompliant public officers are prohibited from proceeding as if they had complied with the

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> . . .After the default [of a defendant] is entered, the court shall give each surety immediate notice not to exceed 7 days after the date of the failure to appear. . . . Each surety shall be given an opportunity to appear before the court on a day certain and show cause why judgment should not be entered against the surety for the full amount of the bail or surety bond. If good cause is not shown for the defendant's failure to appear, the court shall enter judgment against the surety on the recognizance for an amount determined appropriate by the court but not more than the full amount of the bail, or if a surety bond has been posted the full amount of the surety bond.

statute."[51] It found the notice provision of the bail-bond statute was such a provision, because it protected the surety's right to immediately begin searching for an absconding defendant to have him returned to custody so it does not forfeit the amount it posted on his behalf:

> Requiring the court to provide notice to the surety within seven days of the defendant's failure to appear clearly protects the rights of the surety by enabling the surety to promptly initiate a search for the defendant, which is obviously significant to the surety because "[a] surety is generally discharged from responsibility on the bond when the [defendant] has been returned to custody or delivered to the proper authorities...." . . . A surety's ability to apprehend an absconding defendant is directly affected by whether the surety has received prompt notice of the defendant's failure to appear because the former's ability to recover and produce an absconding defendant declines with the passage of time. [*Gaston*, 496 Mich at 330-331.]

There are critical distinctions between *Gaston* and the statute involved there which make *Gaston*'s strict-compliance holding inapplicable to the habitual-offender statute.

1. *Gaston* did not even cite MCL 769.26.

This Court asked the parties to consider *Gaston*, and also MCL 769.26 and MCR 2.613. Applying a harmless-error review here under MCL 769.26 would in no

[51] *Gaston*, 496 Mich at 323.

way conflict with *Gaston*, since the latter did not even cite or consider the applicability of that statute.[52]

2. MCL 769.26 is in the same chapter of the Code of Criminal Procedure as the habitual-offender statute; the bail-bond statute is not.

It would be reasonable to assume the Legislature intended MCL 769.26 to apply to the review of alleged errors in complying with the habitual-offender statute, since they are both in Chapter 769 (or Chapter IX) of the Code of Criminal Procedure. The bail-bond statute is in Chapter 756 (or Chapter V).

3. The present question involves early, not late, service of the notice.

In *Gaston*, the surety was harmed by the extremely late notice. The issue here involves early notice which resulted in no harm.

4. Unlike a defendant, the surety is not a party and does not appear regularly in court.

The person (or entity) whose rights are being safeguarded by the two notice requirements differ in a crucial way. The notice to the surety pertains to a non-party to the underlying criminal action. Since the surety is not a party, it does not appear

[52] *Gaston* briefly referenced MCR 2.613 in a footnote to refute the People's reliance on it. The Court, notably, quoted the rule in finding that not correcting the trial court's error would be "inconsistent with substantial justice . . ." *Gaston*, 496 Mich at 336 n 6 (internal quotation to MCR 2.613 omitted). In other words, it *applied* the harmless-error rule in rejecting the People's argument, rather than finding the rule did not apply.

in court for each hearing and is not privy to case developments, including whether defendant has absconded.[53] It has no way of learning this *except by* the required notice. In other words, the notice is the sole way to satisfy the bail-bond statute's purpose of safeguarding the surety's right to protect its financial interest. In contrast, a defendant is a party, appears in court for each pretrial hearing, and hears all the discussions and developments. Hence a defendant has other ways of learning—at an early stage in the case—that he faces enhanced sentencing.

5. A defendant is, at a minimum, aware of his prior convictions; the surety's notice contains new information previously unknown to it.

The notice to the surety provides *new* information (that is, that defendant has failed to appear) which is otherwise not known to it. In contrast, a defendant is aware of his prior convictions, and will learn after discussions with his attorney—which occur *at least* by the AOI, if not the preliminary exam—that prior convictions can result in enhanced sentencing.

[53]Hence, the "*In Re*" title of the case. The surety is a "claimant," not a party. See also, the newly released opinion of *In re Forfeiture of Bail Bond (People v Stanford)*, __ Mich App __ ; __ NW2d __ (2016) (Docket No. 328784), where the Court of Appeals cited *Gaston* for the proposition that the bail bond statute's "purpose was to protect public interest, as well as the rights of third persons." *Id*., slip op at 3. In contrast, MCL 769.13 protects the defendant and no removed third parties.

6. The surety has a more pressing need to receive the information immediately.

Time is of the essence for a surety "to promptly initiate a search for the defendant, which is obviously significant to the surety"[54] so it can be discharged from responsibility on the bond when defendant has been returned to custody. A surety will almost certainly forfeit its money if it does not immediately begin searching for defendant. Notice to a defendant of enhanced sentencing is certainly time-sensitive as well, for example in considering plea offers, but not to the extreme degree a surety's notice is.

7. The amendments to each of the statutes indicate different legislative intents, one statute becoming more, and the other less, restrictive.

This Court in *Gaston* noted the legislature amended the bail-bond statute to (1) *decrease* the amount of time the trial court had in which to give the surety notice, from twenty to seven days, and (2) change the language from the permissive "*may* give the surety . . . twenty days' notice," to the mandatory "*shall* give each surety immediate notice not to exceed 7 days . . . "[55]

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[54] *Gaston*, 496 Mich at 330.

[55] *Gaston*, 496 Mich at 328, quoting from an amendment to MCL 765.28(1) (emphasis in *Gaston*; internal quotation omitted).

Before the 1994 amendment to MCL 769.13 which governs today, the habitual-offender statute contained no time period in which the defendant needed to be given notice of sentence enhancement. In *People v Shelton*,[56] this Court set the time period for giving such notice at 14 days after the AOI.[57] The 1994 amendment to the habitual-offender statute codified—and increased—the time period to 21 days.[58] In *People v Morales*,[59] the Court explained: "The expansion of the time allotted from fourteen to twenty-one days signifies a desire to balance the credible concern of prosecutors that their ability to charge a defendant as an habitual offender not be undercut by too short a period, with the equally credible concern of defendants that they be given adequate notice to meet the charges against them."[60] Thus, the legislature in the 1994 amendment expanded the time period so as not to "undercut"

[56]*People v Shelton*, 412 Mich 565 (1982).

[57]The *Shelton* Court held that such notice (which was placed on a supplemental information) "is filed 'promptly' if it is filed not more than 14 days after defendant is arraigned in circuit court . . . ." *Shelton*, 412 Mich at 569.

[58]MCL 769.13(1), as amended by PA 1994 No. 110.

[59]*People v Morales*, 240 Mich App 571 (2000).

[60]*Morales*, 240 Mich App at 584.

the prosecution's charging time frame, while in the bail-bond statute, the legislature greatly reduced the court's notice period. These opposite legislative intents undermine *Gaston*'s applicability here.

8. While the habitual-offender statute contains mandatory language as in *Gaston*, that lone similarity should not dictate the standard of review.

The *Gaston* Court discussed the distinction the Court of Appeals drew in *In Re Forfeiture of Bail Bond (People v Moore)*[61] between "directory" versus "mandatory" statutory language.[62] The *Gaston* Court overruled *Moore*'s conclusion that the bail-bond statute's notice provision was "directory," finding the *Moore* Court had

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[61] *In Re Forfeiture of Bail Bond (People v Moore)*, 276 Mich App 482 (2007), overruled by *In re Forfeiture of Bail Bond (People v Gaston)*, 496 Mich 320, 339 (2014).

[62] *Moore* adopted this distinction from 3 Sutherland, § 57:19, pp 72–74, which stated, in part:

> [T]ime provisions are often found to be directory where a mandatory construction might do great injury to persons not at fault, as in a case where slight delay on the part of a public officer might prejudice private rights or the public interest. The general rule is that if a provision of a statute states a time for performance of an official duty, without any language denying performance after a specified time, it is directory. However, if the time period is provided to safeguard someone's rights, it is mandatory, and the agency cannot perform its official duty after the time requirement has passed. [Sutherland quotation is from *Gaston*, 496 Mich at 329-330.]

overlooked a critical exception to the general rule stated in the treatise it relied on, Sutherland, that is, if the time period is provided to safeguard someone's rights, it is mandatory, and the agency cannot perform its official duty after the time requirement has passed.[63] The *Gaston* Court concluded this exception applied to the bail-bond statute, making its language mandatory: "This exception to Sutherland's general rule would certainly apply in this case because the time period at issue [in the bail-bond statute] was clearly "'provided to safeguard someone's rights.'"[64]

So too, the habitual-offender statute's time period is provided to safeguard someone's rights; it protects a defendant's right to be promptly made aware of sentencing penalties. The cases are otherwise distinct, though, and the mandatory-language similarity should not trump the differences between the cases. For all the reasons discussed above, a defendant's rights under the habitual-offender statute are still safeguarded under a harmless-error standard of review, unlike in *Gaston*.

[63] *Gaston*, 496 Mich at 330.

[64] *Gaston*, 496 Mich at 330.

III.

An error in anything done or omitted by a party is harmless unless it results in a miscarriage of justice or, stated differently, unless refusal to grant relief would be inconsistent with substantial justice. Here, defendant was not prejudiced by any lack of proper service or proof thereof, since he had actual notice of the enhancement *before* the AOI, and counsel waived the reading of the information, suggesting he had a copy of it. Any error was harmless.

Standard of Review

This issue is preserved since defendant filed a timely circuit motion for resentencing in which he claimed the prosecution did not timely serve him with the habitual-offender notice. 2/28, 3-4. The trial court found the People had complied with the habitual-offender statute and found no error. For the reasons stated in issue II, the People contend the harmless-error standard of review applies to alleged errors in the service of a habitual-offender notice. The People include issue III in the event this Court finds an error in the service of the notice and agrees the harmless-error standard applies.

Discussion

The harmless-error review should apply here, and defendant was not prejudiced since he had actual notice of the enhancement *before* the AOI and the notice did not subsequently change, and counsel waived the reading of the information, suggesting he had a copy of it.

The People cannot represent when defendant was served with a written copy of the habitual-offender notice enhancement, or if he in fact was, because the prosecution did not file a proof of service. It is the People's position, though, for the reasons shown below, that the record reflects—at a minimum—actual notice to defendant, and the strong likelihood that defense counsel had the felony information at least by the preliminary examination. The notice was never amended after that. Thus, any error in complying with the statute was harmless.

A. Defendant has never challenged the accuracy of the enhancement notice.

Defendant has never claimed any of the information in the habitual-offender notice was incorrect, nor has he identified any harm he suffered as a result of receiving actual notice (either oral, written, or both) before the AOI.

B. The three charging documents each contained the enhancement notice, which never changed thereafter to increase his potential punishment.

MCL 769.13 does not specify on which document the enhancement notice must be placed. The Wayne County Prosecutor's Office has chosen to place the notice directly on the charging documents (the felony warrant, the felony complaint, and the felony information) to ensure the notice is timely served, and to notify defendant as soon as possible of the possible enhancement.[65] All three of the charging documents are prepared at the same time, that is, when the warrant prosecutor has decided what charges to recommend, and their contents are "carbon copies" of one another.[66] The charging documents in this case were each dated May 24, 2013. Defendant does not dispute that each of them contained the enhancement notice, *and* that the notice never changed after that to increase his offender level.

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[65]If a defendant's habitual-offender status is not apparent when the charging documents are prepared (which was not the case here), it is the practice in this county to add the enhancement notice later in an amended information, but still within 21 days after the AOI or, if waived, the filing of the original information.

[66]While the information will usually have the same date as the other charging documents (as it did here), the document does not take effect until defendant is bound over at the preliminary examination. It is then signed and filed at the AOI.

C. The prosecution filed the enhancement notice in district court when it presented the complaint and warrant to the magistrate for his signature.

The circuit Register of Actions reflects that the "Recommendation for Warrant" and a "Habitual Offender" notice were filed in district court on May 24, 2013. The Register then shows the warrant was "signed" (actually, signed and then issued[67]) by the magistrate on the same date. Thus, contrary to defendant's claim, the enhancement notice *was* filed, and it was filed earlier than required.

D. Defendant received actual notice of the enhancement at his arraignment on the warrant.

Defendant was arraigned on the warrant via video on May 25, 2013.[68] There were no attorneys present for either side.[69] The district court read the charges and penalties to defendant, *including the habitual offender third notice*. Defendant acknowledged he heard the charges *and* penalties. Specifically:

> THE CLERK: Thank you, case number 13-58994. The People of the State of Michigan versus Phillip Joseph Swift. The Defendant is charged with Count one, Armed Robbery. The penalty is life. Count two, Home Invasion First Degree. The penalty is 20 years and/or five thousand

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[67]The AOW could not have been held until the magistrate issued the warrant. MCR 6.104(B) and (D).

[68]He was in custody on another matter.

[69]A defendant is not constitutionally entitled to appointed counsel at the AOW. *People v Horton*, 98 Mich App 62, 72 (1980).

> dollars. Count three, Unarmed Robbery. The penalty is 15 years, DNA is to be taken upon arrest. Count four, Firearm Weapons discharged in or at a building. The penalty is 4 years and/or two thousand dollars mandatory forfeiture of weapons or device. Count number five, Felony Firearm Weapons. The penalty is two years. *The Defendant has a second offense notice also a habitual third offense notice. The defendant is present.*
>
> THE COURT: Sir, state your name.
>
> THE DEFENDANT: Phillip Joseph Swift.
>
> THE COURT: And you heard the charges that were read *and the penalties you could receive*?
>
> THE DEFENDANT: Yes. [5/25, 3 (emphasis added).]

The above exchange proves defendant was put on notice, even if only orally, that he faced enhanced sentencing as a habitual offender.[70]

[70]In the Court of Appeals defendant acknowledged receiving actual notice in district court, although his second sentence seems to contradict the first one: "Contained in the warrant information filed in the *district court*, Mr. Swift *was put on notice* that upon conviction, the prosecutor would be seeking enhancement of his sentence as a third habitual offender, pursuant to MCL 769.11. Mr. Swift disputes whether this notice was provided to him in the district court or the circuit court." Defendant's Court of Appeals brief, p 4 (emphasis added).

E. The preliminary examination transcript confirms that defense counsel had a copy of the enhancement notice, since she clearly had a copy of the charges.

By the preliminary examination, the record confirmed that defense counsel (and thus defendant) had a copy of the either the felony warrant, the complaint, the information, or all three, since counsel objected to the prosecutor's request to amend the armed-robbery count (I). 6/6, 29.[71] The prosecutor wanted to add a vase as one of the dangerous weapons listed in that count, and defense counsel objected to the original weapon listed (a gun), never claiming she had not received a copy of the charges in either the felony warrant, complaint, or information:

> [DEFENSE COUNSEL]: Your Honor, *with respect to Count one, I would respectfully object*, and I don't believe that specifically as to a gun, there's no such testimony supporting that. Mr. Smith indicates that there is a gun five to ten minutes later, that's when that came in, when somebody left and according to his testimony that person came back.
>
> THE COURT: Okay.

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[71]The prosecutor later filed a signed, amended felony information on September 3, 2013, which added an additional weapon (vase) used during the armed robbery. The habitual notice remained the same. See Appendix B.

At trial on September 5, 2013, the prosecutor requested that the felony information be amended again to change the incident location's apartment number from 13 to 14. Defense counsel did not object, and the court allowed the amendment; it appears the change was only hand-written on the (already) amended information, rather than the amended information being formally corrected again. 9/5, 149.

> [DEFENSE COUNSEL]: Your Honor, I would argue that there may be a question of fact *as to the Count three, not as to Count one*, that's my argument. And other than that, I'm in an unfortunate position of indicating that these are questions of fact. [6/6, 29-30 (emphasis added).]

Logically, since defense counsel could discuss both Counts I and III, she must have received a copy of the charges in at least one, if not all, of their three written formats (warrant, complaint, or information). Since each of these documents contained the enhancement notice, defense counsel must have had a copy of the notice as well. Thus, defendant was on notice at least by this date of the sentence enhancement.

F. The prosecution filed the enhancement notice in circuit court at the AOI.

The People complied with the habitual-offender filing requirement by filing the enhancement notice at the AOI on June 13, 2013. The trial court expressly found at the post-sentencing motion hearing that the information was "in fact in the court file" at the AOI. 2/28, 6. Thus, even under a literal reading of the "within 21 days after" rule, this filing was timely, not early, and the document was accessible to defense counsel if he did not already have it.[72]

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[72]In the recently decided case of *People vNorfleet*, __ Mich App __ ; __ NW2d __ (2016) (Docket No. 328968), defendant alleged the prosecution did not timely serve him with the habitual-offender notice. The Court of Appeals upheld the sentence enhancement based solely on the fact that the felony information which

G. Defense counsel waived the reading of the information at the AOI.

If defense counsel had not yet been served with a copy of the Information, it would seem logical he would have said so at the AOI instead of waiving the reading of a document he had not seen. 6/13, 3. And if counsel's waiver was based on a knowledge of the charges rather than on having seen the felony information, whatever charging document he had seen also contained the enhancement notice.[73] There is simply no indication defense counsel did not have a copy of the information containing the enhancement notice at the AOI.

H. When the court mentioned defendant's status as a habitual-third offender at sentencing, neither counsel nor defendant objected.

At sentencing, both defense counsel and defendant confirmed the accuracy of the presentence investigation report after "careful examination . . . ." 9/23, 3. Further, neither counsel nor defendant spoke up to contest the accuracy of the habitual-offender notice, or defendant's status as habitual-third offender when the court

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contained the notice was dated March 24, 2015 and the AOI occurred on March 26, 2015. The Court did not determine whether the notice had been filed or served, but concluded that since service may occur at the AOI, defendant "had notice of the prosecution's intent to seek sentencing enhancement at his arraignment . . ." *Id*., slip op at 4. This reasoning equally applies here.

[73]And if counsel had not seen any charging document and still waived the reading of the information, then this calls into question counsel's performance, not the prosecutor's.

mentioned this. 9/23, 11. Defense counsel merely mentioned, at that point, that enhanced sentencing was within the court's discretion. 9/23, 11.

Thus, while defendant clings to a strict reading of the habitual-offender statute, the prosecution more than complied with the statute's purpose to give prompt notice, by including the notice on each charging document from the day he was charged and never changing his offender level thereafter. As the Court of Appeals noted, defendant has never argued "that he had any viable challenge to the habitual offender enhancement."[74] Nor does he now.

In sum, defendant was put on notice in a timely manner—early even—that he face enhanced sentencing, and he has not challenged the accuracy of the notice. Any error in complying with the habitual-offender statute was harmless.

[74] *Swift*, p 3.

RELIEF

WHEREFORE, the People ask this Honorable Court to deny defendant's application for leave to appeal in its entirety without granting relief. Alternatively, if this Court grants the application, the People ask this Court to affirm the Court of Appeals decision of February 19, 2015.

Respectfully submitted,

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